THE SUPREME COURT, SELF-PERSUASION, AND IDEOLOGICAL DRIFT

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INTRODUCTION

Judging is not a rational pastime. This is accepted wisdom. The popularity of legal realism is evidence of this fact.[1] In the mid-twentieth century, legal realism, with its emphasis on the role of intuition and individualistic interpretation of the law replaced formalistic accounts of judging as logical, rule-based exercises with a single correct outcome.[2] More recently, data from social science research has exploded onto the scene. Evidence of bias in decision making started with accounts of how laypeople make decisions. Legal scholars increasingly accepted and incorporated into their theories the premise that human beings, in a wide variety of contexts, are subject to biases and errors of logic. Predictably, scholars have applied axioms from behavioral theory to account for decision-making in individuals with particular legal roles, such as lawmakers, juries, and judges.[3] Empirical investigations focusing specifically on judges reveal familiar patterns of error, sealing the fate of formalistic accounts of judging as antiquated and inaccurate.[4] Today, scholars in law, political

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[1] BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15 (2007) (discussing the influence of legal realism on legal education).

[2] Some of the earliest writings included works by Jerome Frank, Oliver Wendell Holmes, Karl N. Llewellyn, and Roscoe Pound. JEROME FRANK, LAW AND THE MODERN MIND 42-47 (1930); OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Little, Brown, & Co.) (1881) (in which Justice Holmes wrote, "The life of the law has not been logic; it has been experience"); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 448-49 (1930); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223-24 (1931) [hereinafter *Some Realism About Realism*]; Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 700 (1931). For a definition of legal realism, see Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 732 (2009) ("Realism refers to an awareness of the flaws, limitations, and openness of law—an awareness that judges must sometimes make choices, that they can manipulate legal rules and precedents, and that they can be influenced by their political and moral views and by their personal biases . . . .").

[3] *See, e.g.*, Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 24 (2007) [hereinafter *Blinking on the Bench*]; Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) [hereinafter *Inside the Judicial Mind*]; Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 63-66 (2000); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1258-59 (2005).

[4] As one jurist put it, "A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or inferr the thing to be resolv'd by anothers

science, and the behavioral sciences agree that judges are influenced by extra-legal factors when making decisions.

Not surprisingly, one of the factors that influence Justices' decisions is their own ideology. The careful selection of appointees to the federal bench (as well as the frequent opposition to nominees) bespeaks the import role that ideology plays in judicial decision-making.[5] Justices' views on social, political, institutional, economic, and legal issues influence their conclusions regarding constitutional interpretation.[6] Interestingly, although the Justices' views would seem to be stable, ample research has revealed that members of the Court drift ideologically.[7] Given the central role of ideology in judicial decision-making, factors influencing changes in ideology are likewise of fundamental importance.

Although a small body of work investigates the influence of cognitive biases in judicial decisions, no scholarship has directly examined the effects of opinion-writing on judicial decision-making. Specifically, no investigation to date has examined the potential for a Justice's written advocacy to systematically alter his or her ideological position. This Article proposes a new theory to explain ideological movement on the bench: self-persuasion effects as a result of drafting opinions in which Justices advance particular arguments. Evidence from behavioral science supports the idea that a form of implicit internal attitude change can occur when judges offer justifications for the positions they take on issues. This phenomenon is supported by research on Bem's Self

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understanding or reasoning . . . ." Bushell's Case, (1670) 124 Eng. Rep. 1006, 1013 (C.P.).

[5] Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 620 (2003) ("I once saw it written that every generation believes that it is the first to really discover sex. So, too, it seems that every generation has the sense that it is the first to uncover that ideology has a role in the judicial selection process. This is nonsense.").

[6] Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135, 135-36 (2006) (noting that "the position frequently labeled 'attitudinalist,' holding that policy preferences overwhelm legal considerations in justices' decisions, seems dominant among quantitatively oriented scholars—and reasonably so.").

[7] Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1519-20, 1522, 1528 (2007).

Perception theory, cognitive dissonance, and other theories implicating internal justification.[8]

If self-persuasion is in effect on the bench, we have reason to be concerned. First, self-persuasion effects create attitude change without justification. From a rationality perspective, the merits of a position do not become stronger simply because someone has given voice to them, so they should not be more influential. Second, under certain circumstances, self-persuasion leads to polarization, or extremism. Justices who repeatedly write opinions in favor of particular viewpoints systematically move toward increasingly polarized views.

The Justices who draft the most important opinions have a tremendous amount of power to influence policy.[9] If there is concern about extremist attitudes on the bench, there is a corresponding reason for unease over the potential for those Justices who are drifting toward more polarized positions to be the same Justices who are writing the majority of important opinions.[10] Extremism among Supreme Court Justices is generally not a valuable quality for the simple reason that extremism makes it less likely that a Justice will listen to arguments with an open mind. We have particular concerns about polarized views in judges because of the potential such views have to interfere with a fair and accurate interpretation of the law. As Larry Kramer noted, one justification for judicial supremacy is that courts provide interpretations of constitutional law that are consistent with fidelity to principles of justice and law.[11]

This Article will argue that not only are judges' decisions, like those of laypeople, influenced by personal attitudes, but that in writing the opinions that support their decisions, judges can experience ideological drift as a result of a phenomenon called self-persuasion. This Article will examine data from Supreme Court opinions in order to discern whether, as a result of authoring opinions, Justices' ideology move progressively in the

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[8] *See infra* Part I.E.

[9] Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 247-48 (2000) (for an example of the powerful influence wielded by the Justice who drafts an opinion).

[10] *See id.*

[11] Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959, 992 (2004).

direction of the views they have espoused. This examination is timely, in light of recent concern about ideological extremism on the bench, and evidence that the Court is becoming increasingly polarized.[12]

Part I of this Article sets the stage for the subsequent discussion by providing background on various theories of judicial reasoning. Part II describes the method for determining the predominant ideology of any given majority opinion, which is to use the ideology of the assigning Justice as a proxy for opinion type. Part III uses Maltzman and Walhbeck's opinion assignment data for Supreme Court Justices between 1986 and 1993,[13] and Martin-Quinn scores to draw tentative conclusions about the relationship between ideas put forth by Justices' arguments in majority opinions, and ideological movement.[14] This analysis allows for an examination of the validity of the self-persuasion hypothesis. The results of this analysis do not support the self-persuasion hypothesis. Part IV suggests a number of reasons why any self-persuasion effects might be obscured and also describes factors that could mitigate the effects of self-persuasion.

I. THEORIES OF JUDICIAL REASONING

Legal scholarship from the past century is rife with theories about how judges make decisions.[15] The discussion has been enriched by scholars in the disciplines of political science, sociology, and psychology, drawing on contributions from other fields as well.[16] It would be an impossible task to begin to do justice to the myriad theories that are implicated in judicial decision-making in a short essay. However, in order to lay the

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[12] Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1333-36, 1340 (2008) ("The Roberts Court after its first full Term appears to be deeply divided and ideologically polarized.").

[13] Forrest Maltzman & Paul J. Wahlbeck, *Opinion Assignment on the Rehnquist Court*, 89 JUDICATURE 121, 121-24, 126 (2005).

[14] *The Ideological History of the Supreme Court, 1937–2007*, TARGETPOINT (June 2, 2009), http://www.targetpointconsulting.com/scotusscores-labels.html [hereinafter *The Ideological History of the Supreme Court*].

[15] For a review of judicial behavior studies, see generally LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997).

[16] Other disciplines relevant to this discussion include linguistics, cultural anthropology, and philosophy.

groundwork for my claim, I offer a very brief overview of the relevant theory and empirical findings.

A. Legal Realism

The modern understanding of judicial reasoning begins with legal realism. Legal realism is characterized by attention to the "peculiar views of the individual judge."[17] One of the most well-known early legal realists was Oliver Wendell Holmes, who wrote that the law consists of "prophecies of what the courts will do in fact."[18] Major goals of early proponents of legal realism included challenging the absolutist notion of the interpretation of law and using social science as a tool.[19] Legal realism teaches us that critical features of judging can be explained in terms of the jurist's political worldview. As Karl Llewellyn stated over eighty years ago:

> Some have attempted study of the particular judge — a line that will certainly lead to inquiry into his social conditioning. Some have attempted to bring various psychological hypotheses to bear. All that has become clear is that our government is not a government of laws, but one of laws through men.[20]

Legal realism was a response to the formalist school of thought, which held that laws were absolutes with a single correct interpretation, and that it was the job of jurists to discern this

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[17] Christopher G. Tiedeman, *The Doctrine of Stare Decisis: And a Proposed Modification of its Practical Application, in the Evolution of the Law*, 3 UNIV. L. REV. 11, 19-20 (1896).

[18] Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). He also regarded the United States Constitution as "an experiment, as all life is an experiment." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Karl Llewellyn was another early advocate of legal realism, which he characterized as a "method." KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 510 (1960).

[19] *See* Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory*?, 95 CORNELL L. REV. 61, 72 (2009) ("The old realism had many branches, but three are worth noting here: (1) the realism that aimed to redefine law in terms of the centrality of facts and empirical evidence; (2) the realism that aimed to inform law through social science such as sociology and psychology; and (3) the realism that aimed to construct a theory of judging that refused to accept doctrine's determinacy and sufficiency.").

[20] *Some Realism About Realism*, *supra* note 2, at 1242-43 (footnotes omitted).

singular truth. Legal realism questioned the presumption that human beings could hone in on the one correct interpretation of law. Legal realism also captured the notion that the truth might look very different, depending upon where one stood in the world and upon one's views and experiences in various areas.

Legal realism shares fundamental characteristics with behavioral law, in that they both grew out of skepticism of an account of behavior that was too neat and clean to have predictive validity. While legal realists were pushing back on the formalistic view of judging, in a parallel universe, behavioral law was questioning the assumptions of rational choice theory. Rational choice theory, popularized by the Chicago School of Economics in the mid twentieth century, advanced a notion of human behavior in which the individual behaved predictably to a set of incentives, choices, or risks by maximizing their chances of a favorable outcome. Originally an economic model, rational choice theory was increasingly advanced in the middle of the twentieth century as a theory to explain human behavior in society and politics.[21]

B. Bounded Rationality

In the 1950s, Herbert Simon coined the term "bounded rationality" to capture the notion that the rationality of human decision making is limited by informational, cognitive, and time limitations.[22] Shortly thereafter, Kahneman and Tversky developed prospect theory, which was an account of how human beings make decisions about risk under uncertain conditions.[23] Meanwhile, scholars in the fields of social and cognitive psychology, who for the most part were not asking questions about law and policy, were independently creating a vast body of empirical work on attitude formation. Although legal scholarship has largely focused on models derived from bounded rationality and prospect theory—collectively referred to in this essay as *behavioral law*—the entire body of work related to judgment and

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[21] *See, e.g.*, GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 8-9 (1976).

[22] HERBERT A. SIMON, MODELS OF MAN: SOCIAL AND RATIONAL 198-99 (1957).

[23] Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 274-89 (1979).

choice, attitude formation, emotion, and persuasion is relevant to how judges decide issues.[24]

By and large, the behavioral law scholarship has cataloged specific cognitive patterns that interfere with an individual's ability to reach the logically correct conclusion on certain decision-making tasks. One example was demonstrated by asking participants in a study to answer either 9 x 8 x 7 x 6 x 5 x 4 x 3 x 2 x 1 = ? or 1 x 2 x 3 x 4 x 5 x 6 x 7 x 8 x 9 = ?[25] Under timed conditions, participants who saw the former gave an average answer of 4,200, whereas participants who saw the ascending numbers estimated on average only 500.[26] Neither answer is correct (the correct answer is 362,880—not terribly surprising given the short amount of time provided for arriving at an answer.[27] Most interesting is the difference in the estimates. Clearly, the order in which the numbers appear is irrelevant, why should it make such a difference? The explanation is the anchoring effect, which states that decision-makers tend to "anchor" judgments on initial values provided and adjust up or down from the initial value.[28] While there is some sense to this approach (the initial value may provide valuable information), the application of this principle can mislead the decision-maker. This effect and others like it may be classified as heuristics, or cognitive "rules of thumb" that serve to make decision-making in a complex world manageable. The studies giving rise to some of the literature in this area involves asking subjects to answer questions that have a single, clearly correct answer.[29] When the majority of subjects fail to provide the correct response, the erroneous nature of the answer is indisputable. Alternatively, an experiment may demonstrate the influence of some factor that is clearly, under the circumstances, irrelevant to the decision task.

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[24] It is unfortunate that too much of the work developed in psychology departments in universities around the world has been largely ignored by law and policy scholars.

[25] REID HASTIE ET AL., RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 73 (2010).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *See* Susan A. Bandes, *Emotions, Values and the Construction of Risk*, 156 U. PA. L. REV. PENNUMBRA 421, 427 (2007) (discussing the fact that heuristics have "mainly been tested in situations requiring judgments about quantifiable, measurable phenomena—such as judgments that rely solely on a calculation of probabilities").

While behavioral scientists have devoted considerable time and energy to studying systematic biases in the way human beings reason and reach conclusions, relatively little of the focus has been on judges.[30] The widely accepted wisdom about the flaws in human decision-making seems not to have been applied to judging in the way that it has been to other areas of human choice. There are a variety of possible reasons for this omission. One is that judges are seen as uniquely rational.[31] Another is that irrational court outcomes have been largely attributed to irrational juries.[32] Finally, judges are not as available for empirical study as other groups for a variety of reasons.[33]

However, the research that has been done on judges reveals that they suffer from the same influences as other individuals.[34] For example, in a study on decision-making in a criminal case, candidate judges in the Netherlands made systematic errors, convicting defendants in a mock trial using the wrong standard of guilt.[35] Another study examined whether U.S. district court judges improve their skills at patent claims as a result of repeatedly having their own cases reviewed by the Court of Appeals for the Federal Circuit.[36] The study revealed that district court judges did

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[30] *See generally* Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 752-59 (2008) (discussing the impact of emotion on humans' cognitive risk assessment and the potential for emotion to lead to systematic errors in that assessment).

[31] W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26, 27 (1999) (stating that judges should be less prone to cognitive errors than members of the general population).

[32] *See generally* Shari Seidman Diamond, 26 HARV. J.L. & PUB. POL'Y 143 (2003) (discussing the origins of beliefs that juries are unpredictable and irrational).

[33] These include overloaded dockets that make judging a busy profession, small numbers relative to other groups that are studied and concerns on the part of judges that their impartiality and professionalism will be compromised. *See* Rob Anderson IV, *8y 7he Num83r5*, PEPPERDINE LAW, Fall 2009, at 15-19, *available at* http://issuu.com/pepperdine/docs/pep-law-fall-2009/18. These factors are so well recognized that very little commentary exists. The obstacles to studying judges are largely taken for granted.

[34] *See Blinking on the Bench*, *supra* note 3, at 24-29; *Inside the Judicial Mind*, *supra* note 3, at 816-18; Rachlinski, *supra* note 3, at 100-01; Wistrich et al., *supra* note 3, at 1323.

[35] *See* Joep Sonnemans & Frans van Dijk, *Errors in Judicial Decisions: Experimental Results*, 28 J.L. ECON. & ORG. 687, 713 (2012). In the Netherlands, candidate judges are lawyers who passed a selection process and for 6 years occupy different functions in courts before becoming full judges. *Id.*

[36] *Id.*

not improve as a result of receiving feedback.[37] In a rare attempt to directly draw inferences about the validity of the Supreme Court's reasoning based upon empirical social psychology, Kahan, Hoffman, and Braman took the Court's invitation to "see for yourself" that its conclusion was correct to a diverse group of Americans. By showing the sample of citizens the video of the car chase that formed the basis for the Court's conclusion in *Scott v. Harris*, 127 S. Ct. 1769 (2007), the authors of the study demonstrated that perception of the reasonableness of a perusing officer's behavior was dependent in part on the cultural world view of the observer, and was not, as the Court suggested, an indisputable conclusion.[38] Empirical studies have also found that judges are subject to the hindsight bias,[39] and that judge-determined damage awards are influenced by the wealth of the defendant.[40] A number of other studies and articles purport to demonstrate the influence of social and cognitive biases on judicial decision-making.[41]

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[37] *See* David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 245-55 (2008).

[38] *See generally* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 837 (2009) ("The result in the case, we argue, might be defensible, but the Court's reasoning was not. Its insistence that there was only one "reasonable" view of the facts itself reflected a form of bias—cognitive illiberalism—that consists in the failure to recognize the connection between perceptions of societal risk and contested visions of the ideal society.").

[39] *See generally* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 595-96 (1998).

[40] Jennifer K. Robbennolt, *Punitive Damage Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 LAW & HUM. BEHAV. 315, 318 (2002).

[41] *See, e.g.*, *Blinking on the Bench, supra* note 3, at 29-43 (stating that "On balance, the judges we tested performed like other groups of well-educated adults—they largely based their judgments on intuition, but also demonstrated some ability to override intuition with deliberation."); *Inside the Judicial Mind*, *supra* note 3, at 784, 829 (concluding that although judges were less susceptible than non-judges to two of five cognitive illusions, judges nevertheless were vulnerable to cognitive bias); Jeffrey J. Rachlinski et al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1257 (2006) (reporting that specialization neither decreases nor increases the quality of judicial decision making); Wistrich et al., *supra* note 3, at 1251-52 (concluding that judges, like juries, are generally unable to disregard the influence of relevant, yet inadmissible, evidence).

C. Cultural Cognition and the Role of Values

In any conversation about judicial attitudes and decision-making, the role of values becomes relevant. One prominent theoretical perspective that has taken a positive view of values in judgment and choice is the cultural evaluator model.[42] "Cultural cognition" refers to the influence of group values on individuals' perceptions of facts.[43] According to Dan Kahan and his colleagues, emotional responses are expressions of socially and culturally derived values.[44] Kahan explains the cultural-evaluator view of risk preferences in this way: "When people draw on their emotions to judge the risk that such an activity poses, they form an expressively rational attitude about what it would *mean* for their cultural worldviews for society to credit the claim that that activity is dangerous and worthy of regulation."[45] The link between emotions and values finds support in the writings of other scholars. As emotion researcher Keith Oatley notes, "[a]lthough in some ways we humans distrust emotions, we also believe they embody our most important values. If you want to know what people value, listen to their stories. In particular, listen to the underlying emotional themes."[46] The take away

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[42] *See* Kahan et al., *supra* note 38, at 748-52. Kahan's work was in large part a push-back in response to the claim that because of pernicious effects of emotion on judgment and choice, members of the public should be largely excluded from participating in risk-policy decisions. *See* Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk Assessment Battlefield*, 1997 U. CHI. LEGAL F. 59, 59-60 (1997) ("[Public risk judgments] are seen as irrational by many harsh critics of public perceptions. These critics draw a sharp dichotomy between the experts and the public. Experts are seen as purveying risk assessments, characterized as objective, analytic, wise, and rational—based on the *real risks*. In contrast, the public is seen to rely on perceptions of risk that are subjective, often hypothetical, emotional, foolish, and irrational.").

[43] Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 732 (2010).

[44] *See generally* Kahan et al., *supra* note 38, at 748-52. The extent to which an individual fits into a particular class—hierarchical, egalitarian, individualistic, and fatalistic—may predict that individual's risk preferences. *See* RICHARD ELLIS, MICHAEL THOMPSON & AARON WILDAVSKY, CULTURAL THEORY 5 (1990). "*Group* refers to the extent to which an individual is incorporated into bounded units. The greater the incorporation, the more individual choice is subject to group determination. *Grid* denotes the degree to which an individual's life is circumscribed by externally imposed prescriptions." *Id.*

[45] Kahan et al., *supra* note 38, at 750-51.

[46] KEITH OATLEY, EMOTIONS: A BRIEF HISTORY xi (2004).

lesson from the cultural model is that "our perceptions of fact are pervasively shaped by our commitments to shared but contested views of individual virtue and social justice."[47]

To the extent that judges are perceived to be interjecting personal values into judicial decisions, we worry that they are being ideological, or worse, political. The cultural-evaluator model has descriptive value, and hence can help to illuminate the connection between judges' emotional reactions to issues and their policy preferences. In addition to the impact emotions can have on policy positions, affective reactions may influence judges' perception of evidence. Kahan argues persuasively that cultural values influence the light in which judges evaluate *facts*.[48] Kahan and his colleagues offer compelling empirical evidence in support of the notion that one's worldview can influence the interpretation of what actions are reasonable under certain conditions. This contribution is critical, because facts are widely believed to be immutable.[49]

D. Judicial Ideology and the Attitudinal Model

Related both to affect-based decision-making and to self-persuasion is the political science scholarship focusing on the impact of judicial "ideology." Perhaps the most famous theory of the role of judicial ideology is the "attitudinal model," proposed by Jeffrey Segal and Harold Spaeth.[50] Legal theorists quickly adopted this model, which incorporated an entirely skeptical view of judicial objectivism.[51] The attitudinal model has been widely

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[47] Kahan et al., *supra* note 38, at 842.

[48] Dan M. Kahan, "*Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413, 422 (2009).

[49] Kahan et al., *supra* note 38, at 887 ("We have suggested that the Court in Scott was wrong to order summary judgment on the ground that it was entitled to 'believe its own eyes'after watching the tape. Its decision to privilege its view of a set of facts on which even a minority of persons who share a set of defining commitments would disagree stigmatizes those citizens as outsiders and in so doing delegitimizes the law.").

[50] *See generally* JEFFREY A. SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 64-69 (1993); *see also* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86-97 (2002); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559-63 (1989).

[51] *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 256 (1997) ("The

linked to the legal realism of the 1920s and 30s. This model, along with the broader political science research on judicial ideology and the modern behavioralist account of judgment and choice, have contributed to a burgeoning body of scholarship devoted to the "new legal realism."[52] The single unifying theme is debunking what Jerome Frank called "the myth about the non-human-ness of judges."[53] Whether one conceives of judicial attitudes as culturally derived, emotive values, or ideology-based policy positions, the work of behavioral law theorists, political scientists, and legal realists has amply documented the influence of personal beliefs on judicial decision-making.[54]

E. Self-Persuasion

The appearance of the term "self-persuasion" occurs only sporadically in social science writings. Psychologist Elliot Aronson has written about the power of self-persuasion to effect lasting change, primarily because the target (oneself) knows that the persuader does not have a particular agenda.[55] Other work by psychologists has revealed that the extent to which an individual is persuaded by a message depends upon whether the message is pro-attitudinal or counter-attitudinal.[56] When the message comports with previously held attitudes, efforts to convince others were more likely to convince the speaker, while counter-attitudinal messages had more persuasive power when the author

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political science attitudinalists' empirical evidence brings something new and important to the debate over the basis of judicial decisionmaking.").

[52] Nourse & Shaffer, *supra* note 19, at 64 (including behavioral economics and legal empiricism as disciplines that "have claimed the mantle of new legal realism"); *see also* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 824 (2002) (explaining the evolution of legal empiricism, starting with legal realism).

[53] JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 147 (1949).

[54] Although there are important theoretical distinctions between the characterizations offered by legal scholars, behavioral scientists, and political scientists, my claim does not depend upon one more than another. Because I acknowledge and value the work offered by each discipline, I refer to judges' personal views as culturally based values, attitudes, and ideology alternatively.

[55] Elliot Aronson, *The Power of Self-Persuasion*, 54 AM. PSYCHOLOGIST 875, 876-84 (1999).

[56] Pablo Briñol et al., *Self-Generated Persuasion: Effects of the Target and Direction of Arguments,* 102 J. PERSONALITY & SOC. PSYCHOL. 925, 925-40 (2012).

of the message was oneself. Because the attitude has come from within, it seems more genuine and trustworthy.[57] When self-persuasion occurs in other fora, it is generally in the context of elucidating another theory or phenomenon.[58] For example, rhetoricians and philosophers have occasionally addressed the issue of self-persuasion in the context of broader arguments. More than forty years ago, philosopher and rhetorician Don Burks argued that there is no "intrinsic difference in the persuasion of another and the persuasion of self."[59] He saw both forms of argument as existing on the same plane and as having similar characteristics. Burks argued that

> The movement from dialectic to rhetoric, from investigation or the deriving of a position to promulgation or advocacy is best understood as a movement along a continuum, and, whether the advocacy is directed to self or to others, one of the highly characteristic features of the rhetorical end of the continuum is the presence of appeal or urging.[60]

When a philosopher or rhetorician speaks of self-persuasion, she might invoke the ancient Greeks, such as Isocrates, who remarked that "[t]he same arguments which we use in persuading others when we speak in public, we employ also when we deliberate in our own thoughts . . . ."[61] Importantly, these musings involve the notion that the human mind is sufficiently dynamic and flexible to accommodate multiple viewpoints. Self-persuasion is the act of the mind hashing through incongruous viewpoints to arrive at a single conclusion.[62] Burks described an important part

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[57] *Id.*

[58] *See*, *e.g.*, Diana C. Mutz, *Mechanisms of Momentum: Does Thinking Make It So?*, 59 J. POL. 104, 105 (1997). The author notes that "[b]y rehearsing these arguments, people engage in a process of self-persuasion whereby their own attitudes move in the direction of the arguments that have been primed by others' views, arguments that would not otherwise have come to mind." *Id.* However, the focus of the article is not on self-persuasion, but on the movement of individuals within a populace in the direction of mass opinion.

[59] Don M. Burks, *Persuasion, Self-Persuasion and Rhetorical Discourse*, 3 PHIL. & RHET. 109, 112 (1970).

[60] *Id.*

[61] ISOCRATES, *Antidosis*, *in* ISOCRATES II 256, 327-29 (George Norlin trans., Harvard Univ. Press 1929).

[62] Mortimer Adler was describing just such a process when he wrote, "What is required formally for dialectic is not two actually diverse minds, but rather an actual

of the ancient Greek self as involved in a rhetorical experience during which, following an internal dialectic, the self resolves the conflicts and arrives at a feeling of certainty.[63] A psychologically based explanation of judicial self-persuasion is somewhat cursorily present in some of the psychological work on persuasion in a variety of contexts.[64]

Several lines of research from social psychology suggests that when an individual provides reasons for his or her own view, that individual may become more extreme in his or her views or more committed to that position.[65] The potential for judicial entrenchment is particularly probable, given that judges—like other human beings—are very unlikely to perceive the operation of personal bias making it unlikely that he or she will attempt to counteract it in any way.[66] Two of the earliest social psychology theories addressing how individuals form attitudes were Leon Festinger's Cognitive Dissonance Theory and Daryl Bem's Self Perception theory.[67] In a series of empirical investigations, Festinger and his colleagues observed that when individuals hold two beliefs that are in conflict, or when beliefs are inconsistent behaviors, individuals alter either the behavior or the belief in order to achieve consistency.[68] Festinger hypothesized that holding inconsistent views or behaving in a way that is inconsistent with an attitude causes people to feel dissonance, a psychologically uncomfortable state.[69] In order to resolve the

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diversity or duality, an opposition or conflict, and this may occur within the borders of a single mind. When it does, that mind is likely to carry on dialectical thinking." MORTIMER J. ADLER, DIALECTIC 10-11 (1927).

[63] Burks, *supra* note 59, at 113.

[64] *See*, *e.g.*, RAYMOND BOUDON, THE ART OF SELF-PERSUASION: THE SOCIAL EXPLANATION FOR FALSE BELIEFS (1994); *see also* MILTON ROKEACH, BELIEFS, ATTITUDES, AND VALUES: A THEORY OF ORGANIZATION AND CHANGE 82-108 (1986).

[65] *See supra* Part I.E.

[66] *See* Kahan et al., *supra* note 38, at 842-43 ("Social psychology teaches us that our perceptions of fact are pervasively shaped by our commitments to shared but contested views of individual virtue and social justice. It also tells us that although our ability to perceive this type of value-motivated cognition in others is quite acute, our power to perceive it in ourselves tends to be quite poor."); *see also* Emily Pronin et al., *The* Bias Blind Spot*: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 369 (2002).

[67] *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957); *see also* Daryl J. Bem, *Self-Perception Theory*, 6 ADV. EXP. SOC. PSYCHOL. 1 (1972).

[68] FESTINGER, *supra* note 67, at 260-62.

[69] *Id.* at 3.

dissonance, the individual alters a belief or attitude in order to achieve consistency. Bem proposed an alternative explanation and called it Self Perception Theory. He hypothesized that people infer their own attitudes through self observation.[70] When an individual encounters an attitude or behavior that is in conflict with an existing attitude, she gains new insight into her own preferences, and changes accordingly.[71]

In Festinger's and Bem's studies, the act of expressing an attitude or behaving in a manner consistent with an attitude had the effect of moving participants in the direction of that expressed attitude. In the years since the first experiments in the 1950's hundreds of studies have been conducted achieving similar results. The robustness of this effect may have special importance for judges. When a judge issues an opinion, the very exercise of writing the opinion and providing rationale for the position may increase the commitment to the professed view. The entrenchment of existing views occurs because expressing reasons for an attitude tends to enforce that attitude. This conclusion is supported by studies designed to elucidate and refine Bem's self-perception theory.

Persuasive Argument Theory (PAT) was advanced by Amiram Vinokur and Eugene Burstein to explain how individuals in groups discuss and evaluate arguments.[72] Although it was designed by looking at argument through a group lens, it has application for self-persuasion. Among other things, PAT assumes that cognitively generated arguments will correspond to discussion-produced argument.[73] Research confirming the underlying assumptions of PAT suggests that the act of preparing argument for group consumption can influence one's own

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[70] Bem, *supra* note 67, at 5.

[71] *Id.* at 5, 16-17.

[72] Eugene Burnstein et al., *Interpersonal Comparison Versus Persuasive Argumentation: A More Direct Test of Alternative Explanations for Group-Induced Shifts in Individual Choice*, 9 J. EXP. SOC. PSYCHOL. 236, 236-45 (1973); s*ee also* Eugene Burstein & Amiram Vinokur, *Testing Two Classes of Theories About Group Induced Shifts in Individual Choice*, 9 J. EXP. SOC. PSYCHOL. 123, 123-37 (1973).

[73] RENÉE A. MEYERS & DAVID R. SEIBOLD, *Persuasive Arguments And Group Influence: Research Evidence And Strategic Implications*, *in* THE PSYCHOLOGY OF TACTICAL COMMUNICATION 136, 140 (Michael J. Cody & Margaret L. McLaughlin eds., 1990).

cognitions.[74] In short, creating arguments in one's own head is essential preparation for external expression of these arguments. The link between cognition and expression implicit in PAT lends support to the self-persuasion hypothesis.

F. Polarization

Another line of research supporting the notion that there is a connection between exposure to pro-position arguments and subsequent attitudes is the literature on group polarization. Group polarization refers to the fact that when like-minded individuals communicate about a shared view, the position of the group members with respect to that issue becomes more extreme.[75] This phenomenon has been found again and again, in groups of all kinds. Importantly, judges are not immune to this effect. For example, recent empirical investigations have found that there is a significant difference in voting, depending upon whether a panel of Justices is composed entirely of Democrats or Republicans, or is composed of both.[76] When all judges are either Democratic or Republican, panels trend toward more extreme voting patterns.[77] Although the group polarization paradigm involves arguments and justifications from *others,* there is no reason to think that one's own rationalizations for a position would be less likely to reinforce the held attitude, in fact research suggests just the opposite. Brehm's 1956 study on choice and preference indicates that when an individual chooses between alternatives, he or she is subsequently more favorable toward the chosen alternative.[78] The tendency for pro-stance argument to

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[74] The link between generating reasons for a position and resulting attitude shift in favor of that position—implicit in PAT—is supported by research on generating arguments and subsequent preferences. In other words, "the available research clearly suggests that the act of generating arguments can lead to attitude change and that generating arguments oneself can lead to more change in one's own attitudes than passively receiving arguments from another person." Briñol et al., *supra* note 56, at 925.

[75] Serge Moscovici & Marisa Zavalonna, *The Group as a Polarizer of Attitudes*, 12 J. PERSONALITY & SOC. PSYCHOL. 125, 125-34 (1969).

[76] CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 149 (2006).

[77] *Id.*

[78] Jack W. Brehm, *Postdecision Changes in Desirability of Alternatives*, 52 J. ABNORMAL & SOC. PSYCHOL. 384, 384-89 (1956).

exacerbate existing attitudes and the propensity for individuals to become more favorable toward positions they adopt, lend credence to the theory that the job of judging reinforces and intensifies attitudes, ideologies, and worldviews.

Joan-Maria Esteban, an economics and public policy researcher and her coauthor, economist Debraj Ray have proposed a model of polarization for Supreme Court Justices consisting of additive representation on both intergroup alienation and intragroup identification.[79] The Esteban and Ray model identifies three characteristics of polarization: (1) homogeneity within a group; (2) heterogeneity among groups; and (3) the number of groups, with polarization measured by the number of dissenting opinions and the number of opinions decided by one vote.[80] Polarization is related to self-persuasion in that each has, as the underlying mechanism driving attitude change, the repetition and reinforcement of existing ideas.

One might think of self-persuasion as a form of self-induced polarization.[81] Importantly, however, polarization is a *social* phenomenon. It depends upon social feedback and affiliation, or the tendency of human beings to gravitate psychologically toward one another.[82] Self-persuasion, on the other hand, is an intensely personal experience during which the agent becomes convinced through the exercise of creating and observing her own argument. Hence, for our purposes here—ascertaining the effect of authoring opinions that advocate particular ideological arguments—polarization and self-persuasion are separate. Indeed, depending upon the circumstances, they might suggest different results. Take, for example, the case in which a Justice who is ideologically conservative—who primarily votes with the conservative bloc—is assigned more opinions by the left-leaning Associate Justice than

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[79] Joan-Maria Esteban & Debraj Ray, *On the Measurement of Polarization*, 62 ECONOMETRICA 819, 824 (1994).

[80] *Id; see also* Tom S. Clark, *Measuring Ideological Polarization on the United States Supreme Court*, 62 POL. RES. Q. 146, 148 (2009).

[81] There is some evidence that the Court was particularly polarized during the period of time analyzed in this study. *Id.* at 150, 152.

[82] Noah E. Friedkin, *Choice Shift and Group Polarization*, 64 AM. SOC. REV. 856, 857-58 (1999).

he is the right-leaning conservative Justice.[83] While polarization would suggest that this Justice would become more conservative (as a result of agreeing with and voting with his fellow conservatives most of the time), the self-persuasion theory would suggest that he might become more liberal, in keeping with the type of opinions he was authoring.

II. ASSIGNING JUSTICE AND OPINION IDEOLOGY

Scholars who study the Supreme Court Justices' voting patterns have noted that contrary to popular wisdom, Justices often do drift ideologically over the course of their tenure on the bench.[84] Measuring the possible connection between migrations in ideology and the process of self-persuasion is tricky because of the myriad features that influence voting behavior. One complicating factor is the practice of assigning the swing-vote Justice the task of writing the opinion.[85] The assignment of the opinion to the Justice with the deciding vote is a strategic move that has drawn a fair amount of attention in the legal and political science academies.[86] This trend, seen as a conciliatory gesture on the part of some and as pure strategy on the part of others,[87] results in the most moderate Justice writing opinions that are both ideologically liberal and conservative. In the recent history of the Court,

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[83] As a practical matter, this will generally only occur when the Justice is relatively "moderate," because the Justice must vote with the ideological out-group sufficiently often to provide ample opportunities for authorship. Note that this phenomenon (flipped, with the CJ being conservative) occurred in a number of instances during the 1986-1993 period on the Court. Liberal Justice Stevens was assigned 89 opinions by Rehnquist, and only 27 by an Associate Justice. Maltzman & Wahlbeck, *supra* note 13, at 124.

[84] *See, e.g.,* Epstein et al., *supra* note 7.

[85] Saul Brenner, *Strategic Choice and Opinion Assignment on the U. S. Supreme Court: A Reexamination*, 35 W. POL. Q. 204 (1982); *see also* Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1755 (2006) ("[The Chief Justice] may reserve his allies for assignments to particularly salient cases, while minimizing his policy loss in cases with close conference votes by assigning those opinions to Justices at the center of the Court's ideological spectrum.").

[86] Wahlbeck, *supra* note 85, at 1754 n.94 (using the Martin-Quinn scores to show that the Court's median "grows significantly more conservative from the 1986 Term to the 1993 Term").

[87] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 131 (1979) (discussing Justice Douglas' claim, saying that "the best way to hold a swing vote was to assign that Justice to write the decision").

Justices O'Connor and Kennedy each have been considered Justices who were swing votes, or the "median Justice." Because Justices O'Connor and Kennedy were voting alternatively with the right or the left, they were reinforcing their own views on both the left and the right.[88]

A. Rehnquist vs. Associate Justice

One rough method of gauging the political leaning of Supreme Court opinions is to determine who the assigning Justice was. When Justice Rehnquist was tasked with assigning the case, it is likely that the majority opinion was right-leaning, and when the Associate Justice assigned the case, the majority opinion was likely left-leaning. During Justice Rehnquist's term as Chief Justice, when the liberal bloc prevailed, Rehnquist was rarely part of the majority, so opinions were generally assigned by the senior Associate Justice.[89] Conversely, when the majority took the conservative position, the Chief Justice was generally in the position of assigning the opinion. The data presented here will use assigning Justice as a proxy for ideological position of the majority opinion. By correlating the ideological position of the assigning Justice with the frequency of authorship of majority opinions, it will be possible to determine whether there is tentative support for the self-persuasion model.

B. Data Sources

In order to investigate the potential for opinion writing to influence subsequent ideological drift, I used two data sources. The first was opinion assignment data compiled by Forrest Maltzman and Paul Wahlbeck.[90] Two features of this data are important. The first is the assigning judge. As suggested above, when the conservative Chief Justice Rehnquist determined who wrote the majority opinion, the opinion was most likely right-leaning. Hence, the author was advocating a relatively

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[88] For example, Justice O'Connor was assigned almost as many opinions by Rehnquist in the period from 1986-1993 as Rehnquist assigned himself, although this trend did not hold true for the assignments made by the Associate Justice during the same period of time. *See* Maltzman & Wahlbeck, *supra* note 13, at 124.

[89] *Id.* at 126.

[90] Maltzman & Wahlbeck, *supra* note 13; *see also* Wahlbeck, *supra* note 85.

conservative position. When Justice Rehnquist did not assign the majority opinion, the view expressed by the majority's author was most likely ideologically liberal. In order for this underlying premise to be sound, the evidence must show that Justice Rehnquist voted in a way that was consistently conservative. To test this, and for data on the ideology of the Justices over time, I turned to scores developed by political scientists Andrew Martin and Kevin Quinn as published in *The Ideological History of the Supreme Court, 1937–2007*.[91] In particular, I examine Martin-Quinn scores for the years 1986-1993, the period of time for which Maltzman and Wahlbeck have opinion assignment data.[92] There is good evidence that Justice Rehnquist was a conservative jurist. The tables below evince a pattern of voting with the conservative bloc.

Martin-Quinn Ideology Scores for Justice Rehnquist for 1978-1985,[93] the eight-year period *prior* to his term as Chief Justice. Higher scores are more conservative.

1978	1979	1980	1981	1982	1983	1984	1985
4.32	4.33	4.18	4.03	3.94	3.87	3.68	3.48

The mean equals 3.97.

Martin-Quinn Ideology Scores for Justice Rehnquist for 1986-1993 during his term as Chief Justice.[94]

1986	1987	1988	1989	1990	1991	1992	1993
3.24	2.83	2.69	2.5	2.26	1.96	1.89	1.71

The mean equals 2.39.

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[91] The dataset, which consists of "ideology numbers" calculated as Martin-Quinn scores, measure "the relative location of each U.S. Supreme Court justice on an ideological continuum." *See The Ideological History of the Supreme Court*, *supra* note 14.

[92] This timeframe, while not as current as it obviously could be, is useful in that it contains assignment data for the Rehnquist Court, compiled by Maltzman and Wahlbeck, based upon the papers of Justice Harry A. Blackmun. *See* Maltzman & Wahlbeck, *supra* note 13.

[93] *Id.*

[94] *Id.*

While Justice Rehnquist did become more centrist with time, his mean score for the time period relevant to this analysis was still 2.39, substantially above the central score of 0, which indicates neither liberal nor conservative. Importantly, he was right-leaning for his entire tenure on the bench. During the period of time we are studying here, Justice Rehnquist voted with the majority 791 out of 976 times, or roughly 81 percent of the time. These numbers suggest a conservative Court. Martin-Quinn scores for Justice Rehnquist support the notion that when he controlled who authored the majority opinion, his assignments were for conservative opinions. So reliable was his conservative slant, that he has been used as a comparison for other conservative Justices.[95] We make an assumption, that on balance, Justice Rehnquist assigned cases where the majority opinion was ideologically conservative and that the Associate Justice assigned cases that were ideologically liberal. This is, of course, an imperfect assumption. It is likely that a number of opinions that were assigned by Justice Rehnquist were ideologically "neutral," which is to say, neither clearly left or right of center. Presumably, disproportionately more neutral opinions were assigned by the Chief Justice to one of the left-leaning Justices, given that liberal Justices were, by definition, less likely to vote in ideologically conservative ways. To put this another way, when a liberal Justice voted with Justice Rehnquist (a precondition of Rehnquist assigning the case to the liberal Justice), the issue was likely relatively neutral.

Assigning Associate Justices who were ideologically Liberal during the period of study.

Brennan: 102
Marshall: 1
Blackmun: 27
Stevens: 10

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[95] For example, Epstein notes that "Frankfurter was second only to John M. Harlan II as the Court's most extreme conservative voter; *he actually ended his service more firmly planted on the right than Chief Justice Rehnquist*." Epstein et al., *supra* note 7, at 1512 (emphasis added).

Total = 140 liberal Associate Justices assigned.

Assigning Associate Justices who were ideologically Conservative during the period of study.

White: 41
O'Connor: 4
Total = 45 conservative AJs assigned

If we are using Chief Justice Rehnquist's assignments as a proxy for conservative opinion assignments, we might worry about the fact that some of the Associate Justices who assigned cases were, themselves, right of center. Perhaps, in some cases, Justice Rehnquist voted with the liberal Justices, and in these cases, his assignments were to write liberal opinions. Conversely, perhaps when a conservative Associate Justice assigned the case, it was because Justice Rehnquist voted with the liberal bloc, and the Associate Justice's assignment was for a conservative opinion. Although it is important to be cautious in drawing too many conclusions from this tentative analysis, several factors suggest that Justice Rehnquist's assignment as a proxy for opinion type is legitimate. First, the two conservative Associate Justices who made assignments during the study period were less conservative than Justice Rehnquist, according to the Martin-Quinn scores. Justice Byron White's average M-Q score for the time that he was on the bench while Justice Rehnquist was Chief Justice was 0.8, while Rehnquist's was 2.48 for the same period of time. Justice O'Connor's average M-Q score during the study period was 1.11, while Justice Rehnquist's was 2.38 (the number is slightly different from the comparison with Justice White because it includes 1993, when Justices O'Connor and Rehnquist were both on the Court, while Justice White was not). The fact that Justice Rehnquist was more conservative than these two Associate Justices suggests that when his vote diverged from theirs, it was they, and not he who swung left.

III. THE DATA

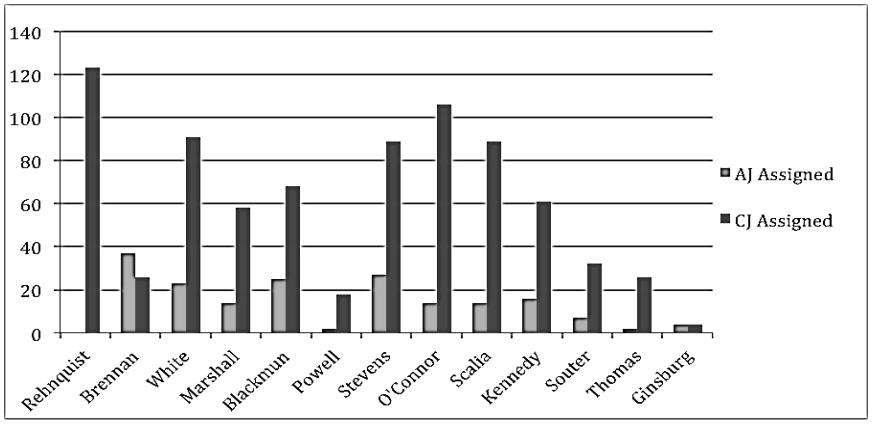
More opinion assignments were made by Justice Rehnquist than by the Associate Justice during this time period. As

mentioned, using Justice Rehnquist as a proxy for conservatism, this suggests an overall conservative Court. It also means that if the self-persuasion hypothesis is accurate, we should see relative conservative trending depending upon the difference between opinions assigned by Justice Rehnquist and opinions assigned by the Associate Justice. In short, the more opinions a Justice wrote that Justice Rehnquist assigned, the more that Justice should trend right. This would mean conservative Justices would become more extreme in their views, and the liberal Justices should stay the same or become more centrist.

A. Initial Analysis

In the chart below, I calculate an opinion ideology-difference number, by subtracting the number of liberal opinion assignments from the number of conservative opinion assignments, with the ideology of each Justice for each of the eight years, as measured by the Justice's Martin-Quinn score.[96]

[96] Martin and Quinn, using data derived from votes cast by the Justices and a Bayesian modeling strategy, have generated term-by-term ideal point estimates for all the Justices appointed since the 1937. *See supra* note 92. For our purposes here, we use only scores for the period of time for which Wahlbeck & Maltzman have gathered reliable opinion assignment data. Using the Martin-Quinn scores allows for intra-Justice comparisons in order determine whether, to what extent, and in what direction Justices moved ideologically. For scores used to calculate these trends, *see The Ideological History of the Supreme Court supra*, note 14.



Higher bars represent a difference in the direction of more Justice-Rehnquist-assigned opinions. Note that the only Justice who had more Associate-Justice-assigned opinions was Justice Brennan—primarily because as the Senior Associate Justice, he often self-assigned.

Martin-Quinn scores reveal that Justice Souter was conservative for his first three terms during this period, before drifting left in 1993, a trend that would continue.

The fact that some Justices seem to have been assigned very few opinions is a function of the fact that several of the Justices listed above were not on the Court for most of the time period under study. Justices Ginsburg and Powell, for example, were only on the Court for one year. Justices Marshall, Thomas, Brennan, and Souter were on the Court for between three and five years. The data for Justices Ginsburg and Powell would allow for very tenuous analysis, so these Justices are not included in the subsequent study, except as points on the charts.

With respect to the remaining Justices, I calculated difference scores by simply subtracting the number of liberal opinions from the number of conservative opinions for each Justice. In all cases except one (Brennan), the difference scores were positive, reflecting an abundance of conservative and neutral decisions.

Based upon the graph above, it is possible to see that some Justices were assigned substantially more opinions by the Chief Justice than by the Associate Justice and that the difference in differences ranged quite a bit from Justice to Justice. The contrast that stands out most is between Justice Rehnquist and Justice Brennan. That these Justices wrote more opinions consistent with their own ideological preference is unsurprising, given that as the Chief Justice, Justice Rehnquist could self-assign opinions and as senior Associate Justice, frequently, so could Justice Brennan.

1. Liberal Trending

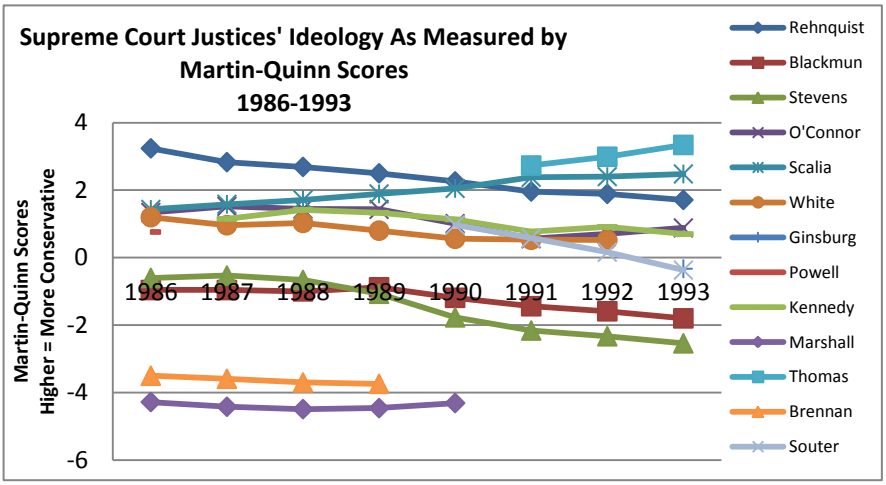
For the period of time under study, only one liberal Justice wrote more liberal majority opinions (as measured by the assigning Justice) than conservative opinions. Hence, according to the self-persuasion hypothesis, only Justice Brennan should have become more extreme in his (left-leaning) position. Although in theory, the self-persuasion hypothesis would predict that the other liberal Justices on the Court could become less liberal by virtue of authoring Justice-Rehnquist-assigned opinions, as mentioned earlier, some of the opinions—and in particular, those opinions that garnered votes by the left-leaning Justices—were likely ideologically neutral. In light of the likelihood that a significant number of majority opinions assigned by Justice Rehnquist to liberal Justices were ideologically neutral, we would not expect to see much movement for these Justices. Justice Brennan, the only liberal Justice to write more liberal than conservative majority opinions during the eight-years under study did trend left over the period. In 1986, Justice Brennan's Martin-Quinn scores were -3.5, -3.59, -3.7, and -3.74, demonstrating steady movement in a liberal direction.

2. Conservative Trending

When it comes to the right-leaning Justices, the imbalance in the number of Chief-Justice-assigned cases provides a good opportunity to investigate the validity of the self-persuasion hypothesis. Justices Rehnquist, White, O'Connor, Scalia, Kennedy and Thomas were all writing opinions assigned by Justice Rehnquist. Of these Justices, two of six (Justices Scalia and

Thomas) became consistently more extreme. When a liberal Justice voted with Justice Rehnquist (a precondition of Justice Rehnquist assigning the case to the liberal Justice), the issue was likely relatively neutral.

Below is a graph that represents the ideological trends of the Supreme Court Justices who were on the Court for the eight years during the study period.



Three of seven Justices became more entrenched in their ideological positions.[97] This is hardly robust evidence for the self-persuasion hypothesis; however, this analysis has not taken into account the type of opinions the Justices were assigned to write. Some opinions, such as those that are neutral and those that are not "salient" may not have the same self-persuasion effect that cases that are ideological "hot-button" (and therefore "salient") cases may. When cases are particularly controversial, they have a number of qualities that implicate Bem's self-perception theory and the cognitive dissonance model more than other types of cases. For example, a controversial issue is typically one that triggers justification and is subject to attack from ideologically opposing parties. These characteristics mean that cognitive dissonance, the justification effect, the need for a consistent sense of self, and self-impression management are all at play.

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[97] *See The Ideological History of the Supreme Court*, *supra* note 14.

B. Analysis for "Salient" Cases

Research has demonstrated that when attitudes are made salient, subsequent preferences in favor of the attitude become stronger.[98] Certainly drafting opinions justifying and supporting a particular position increases the salience or cognitive availability of the associated attitudes for the judge writing the opinion. One empirical study seeking to refine the attitudinal model, investigated the degree to which the salience or prominence of a particular case influenced the voting behavior of United States Supreme Court Justices. The findings supported the idea that when a case was salient, Justices were more likely to vote in a way that was consistent with their ideological leanings.[99] A case can be salient to a judge for a variety of reasons, including media attention or personal relevance. A common way for a case to achieve salience is when a Justice spends time thinking in detail about the issue during the drafting of the opinion or a dissent. External reinforcement may also strengthen previously held views; according to one commentator, points made by attorneys at oral argument "have the potential to reinforce a Justice's views about a case."[100]

Chief Justice Rehnquist, like other Chief Justices, likely attempted to set the agenda in politically salient cases, illustrating the importance of this type of case.[101] Salient cases are the most likely to capture the attention of the public, are the most likely to be deemed "important" by media, politicians, and Americans, and the world. As mentioned previously, evidence suggests that the opinions that fit the attitudinal model are the important, or salient cases. The importance of salient cases for the

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[98] Gerald R. Salancik & Mary Conway, *Attitude Inferences from Salient and Relevant Cognitive Content About Behavior,* 32 J. PERSONALITY & SOC. PSYCHOL., 838-39 (1975). For a definition of "salient," see Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the* Attitudinal *Model*, 28 J.L. & POL'Y 295, 297, 315 (2006).

[99] *Id.* at 307.

[100] Timothy R. Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL'Y 241, 243 (2009).

[101] Politically salient cases are those cases that were reported on the front page of *The New York Times*. *See* Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72-76 (2000).

Justices is consistent with the general findings that attitudes are most ideological when the issues are prominent.[102] Because important cases are those in which a Justice's position is *most likely* to be salient,[103] and individual values or attitudes are most conspicuous, these cases provide the best data for testing my hypothesis.

Greatest percentage of "important" or salient cases assigned, by Chief Justice & Associate Justice (1986-1993)

Chief Justice	**Associate Justice**
Rehnquist (Self)	Brennan
Powell*	Kennedy
White	
Stevens	

Although Justice Powell was assigned a disproporionately large number of majority opinions by Justice Rehnquist, he was only on the bench for one year during the period of study, and hence, the effect of these assignments on his ideological drift is impossible to ascertain.

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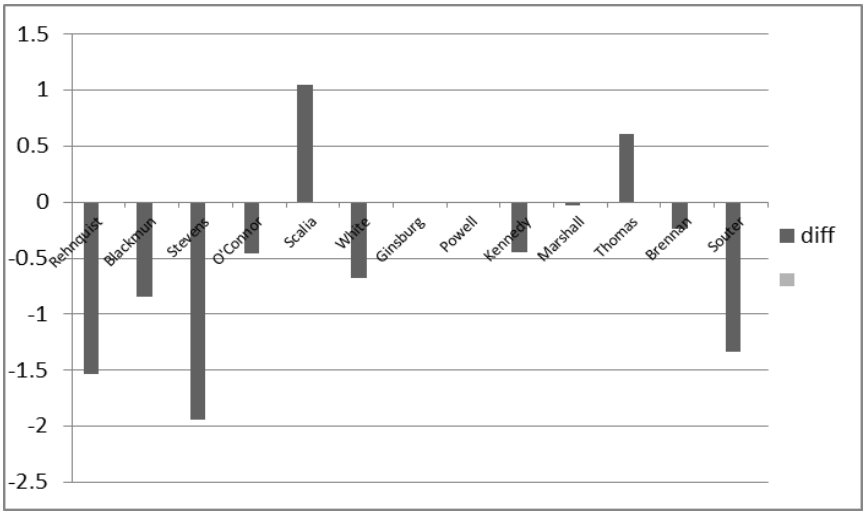
[102] See Unah & Hancock *supra* note 98, for a definition of "salience."

[103] *See generally* Saul Brenner & Jan Palmer*, The Time Taken to Write Opinions as a Determinant of Opinion Assignments*, 72 JUDICATURE 179 *(*1988*).*



The chart above shows the ideological trends for all Justices whose tenures overlapped with the period of study, from 1986-1993.[104] Negative numbers indicate trending toward a more liberal, or less conservative position. (Note that larger bars indicate movement, not actual ideological position.)

The chart below shows only the Justices who authored the bulk of the important, or salient majority opinions between 1986-1993. Positive bars dennote trending more conservative, while negative bars represent trending more liberal. Note that these bars only represent ideological change, not absolute ideology. Ideology is represented by light grey bars for right-leaning Justices and dark grey bars for left-leaning Justices.[105]

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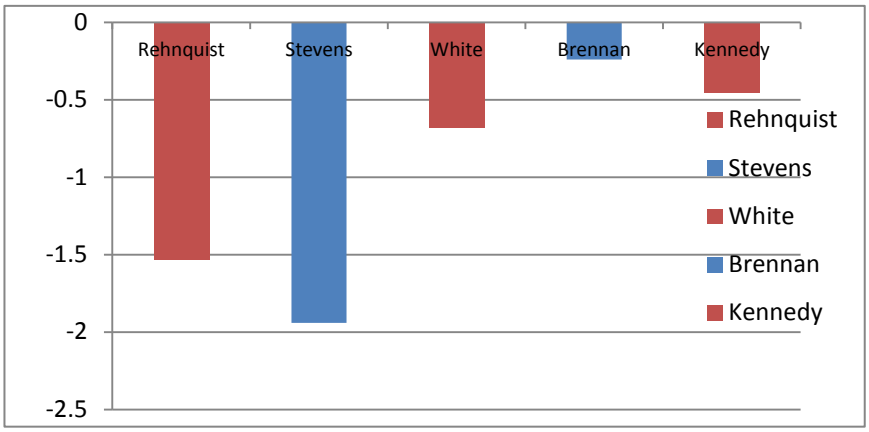
[104] *See The Ideological History of the Supreme Court*, *supra* note 14.

[105] *Id.*



Ideological drift of select Supreme Court Justices who wrote a high number of majority opinions between 1986 and 1993.[106]

Justice	**Greater Number of Opinions (Ideology) For Important/Salient Cases**	**Observed Trend (Right or Left)**	**Compatible With Self-Persuasion Hypothesis?**
Rehnquist [Conservative]	Conservative	Left	No
Brennan [Liberal]	Liberal	Left	Yes
White [Conservative]	Conservative	Left	No
Kennedy [Conservative]	Liberal	Left	Yes

When the opinion assignments are narrowed to consider only important or salient cases, there is little support for the self-persuasion theory. Half of the Justices who were on the bench for more than one year and were assigned a high number of majority opinions drifted in the direction of the ideology of the assigning judge. Standing alone, these data do not support a self-persuasion finding. Either the self-persuasion hypothesis is invalid, or there are other, mitigating considerations. Below, I consider some of the

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[106] This chart was created using data from Maltzman & Wahlbeck, *supra* note 13.

features of each of several Justices on the Rehnquist Court between 1986 and 1993 in an effort to shed some light on why these jurists seemingly changed ideologically.

C. Factors Effecting Justices' Ideology

1. Justice Rehnquist

Justice Rehnquist was considered a stalwart conservative at the time of his appointment, and he remained conservative throughout his tenure on the bench.[107] However, although he started out on the far right, the pattern of his votes suggests an eventual drift left toward a more moderate position. Although at first blush, this trend would seem to contradict the self-persuasion hypothesis, the picture may be more complicated than it looks. When Justice Rehnquist was promoted to Chief Justice, Justice Scalia joined the Court, and it was at this point that Justice Rehnquist began the gradual adoption of a less extreme position. Justice Scalia's presence meant that Justice Rehnquist had another Justice who was similarly consistent in his conservative voting for important cases.[108] When Justice Rehnquist wanted a strong conservative opinion on an important case, he could count on Justice Scalia to draft one.[109] Although Justice Scalia was not

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[107] DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 497 (5th ed. 2010) (insisting that Rehnquist was on the "solid right").

[108] Justice Scalia is particularly well known for his socially conservative views and his sarcastic and often caustic dissents when the majority opinion violates a conservative ideal. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013) (holding 5-4 that legally married same-sex couples should receive the same federal benefits as heterosexual couples); Roper v. Simmons, 543 U.S. 551 (2005) (holding the execution of under-age minors unconstitutional); Lawrence v. Texas, 539 U.S. 558 (2003); Stenberg v. Carhart, 530 U.S. 914 (2000) (invalidating a Nebraska statute outlawing partial-birth abortion); Romer v. Evans, 517 U.S. 620 (1996); Thompson v. Oklahoma, 487 U.S. 815 (1988).

[109] Printz v. United States, 521 U.S. 898 (1997) (establishing the unconstitutionality of certain interim provisions of the Brady Handgun Violence Prevention Act). Justice Scalia continued to draft conservative opinions after Justice Rehnquist was no longer on the bench. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008); *see also* Erwin Chemerinsky, *The Supreme Court Gun Fight: A Case of Conservative Activism*, L.A. TIMES, June 27, 2008, at A27 ("In striking down the law, Justice Antonin Scalia's majority opinion, joined by the court's four other most conservative justices, is quite activist in pursuing the conservative political agenda of protecting gun owners.").

Justice Rehnquist's favorite target for important cases, he may have written some of the more extreme opinions that Justice Rehnquist would otherwise have drafted. It is possible that Justice Scalia's presence accounted for Justice Rehnquist's moderate drift toward the center.

Another factor that might have affected this trend was fewer high-profile left-leaning cases. Chief Justices tend to self-assign the most high profile cases.[110] Justice Rehnquist was no exception. He once commented that "[t]he Chief Justice is expected to retain for himself some opinions that he regards as of great significance." Compared to the Warren and Burger Courts, relatively few civil rights cases were appealed to the Rehnquist Court due, perhaps, to the perception that this Court was hostile to liberal claimants.[111] An overall trend of fewer ideologically loaded cases may have meant that fewer of the most important cases, typically reserved in high proportion by the Chief Justice for himself, were fertile ground for strong conservative value arguments. Instead, the cases with important implications that Justice Rehnquist self-assigned may have been less ideologically provocative, and less likely to promote self-persuasion.

2. Justice Brennan

Despite having been nominated by Republican Dwight Eisenhower, Justice Brennan was liberal throughout his career on the bench. He drafted more than 1,300 opinions during his tenure. During the era when Justice Rehnquist was Chief Justice, because of his status as the Senior Associate Justice, he was in the position to assign the majority opinions he joined that were not also endorsed by Justice Rehnquist. Justice Brennan self-assigned many of the more prominent opinions.[112] As a result, he drafted many of the more left-leaning opinions. Moreover, he was a

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[110] Maltzman & Wahlbeck, *supra* note 13, at 126.

[111] Unah & Hancock, *supra* note 98, at 308.

[112] Maltzman & Wahlbeck, *supra* note 13, at 126. One famous example of an important majority opinion between 1986 and 1993 was *Texas v. Johnson*, a 1989 decision that found First Amendment protection for the act of burning an American flag as a political protest, Justice Brennan wrote for the 5-4 majority: "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 401 U.S. 397, 414 (1989).

prolific writer behind the scenes, often drafting memos to other Justices in an attempt to persuade or expound on some principle he considered important to a case.[113] He earned a reputation for being persuasive, and he may have had this effect on his own thinking. He grew increasingly liberal over the course of his tenure on the bench.

3. Justice White

Justice White does not fit the pattern suggested by the self-persuasion hypothesis; however, his ideology was more sporadically distributed than other Justices. Over the course of his tenure on the bench, which started long before the Rehnquist Court,[114] he grew more conservative in fits and starts.[115] His pattern of voting over his tenure seems more sporadic than many of the other Justices, perhaps because he resisted being labeled or tied to any particular ideological camp. [116] He was the only Justice who had public-service or a plaintiff-oriented background who was appointed by a Democratic president who voted with an agency more often when the agency reached a conservative, rather than a liberal result.[117]

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[113] Rory Little, a former clerk of Brennan's, recalls the importance of Brennan's memos in creating consensus and influencing the opinions of the other justices. Rory K. Little, *Reading Justice Brennan: Is There A "Right" To Dissent?* 50 HASTINGS L.J. 683, 685 (1999). Justice Blackmun's majority opinion in *Roe v. Wade*, 410 U.S. 113 (1973), was influenced by a memo sent to him almost two years earlier when the case was first argued. KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 224-33 (1993). *See also* Souter, *Justice Brennan's Place in Legal History, in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 301 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) ("[S]cholarship is turning up Brennan authorship and influence in significant opinions that bear no Brennan name.").

[114] He was one of the longest serving Justices, having served on the Warren and Burger Courts before Rehnquist was Chief Justice. *Id.*

[115] Epstein et al., *supra* note 7, at 1514.

[116] Bernard W. Bell et al., 51 STAN. L. REV. 1373, 1373-74 (1999) (reviewing DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE (1998)).

[117] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1193 (2008).

4. Justice Powell

As a Nixon nominee, Justice Powell was hailed as a conservative, an apt characterization. Although he was known as a moderate conservative,[118] Justice Powell often cast the deciding vote, earning a reputation as the swing vote on the Court. In 1986, Justice Rehnquist assigned Justice Powell more opinions for important cases than any other Justice, perhaps as a way of keeping Justice Powell's vote.[119] Nevertheless, Justice Powell did not vote more conservatively over the course of Justice Rehnquist's first year as Chief Justice.

5. Justice O'Connor and Justice Kennedy

Like Justice Powell, Justices O'Connor and Kennedy have both, at one time or another, occupied the role of swing-voter on the Court.[120] They were also both President Reagan nominees, along with Justice Scalia. Unlike Justice Scalia, it is certainly fair to say that at various points each has disappointed conservatives. However, they differed in important ways. For the first ten years on the bench, Justice O'Connor remained fairly conservative; this would change as she moved left in her later years on the bench.[121] Justice Kennedy was more likely than Justice O'Connor to vote with the liberals on the bench, although there certainly were exceptions. Finally, both moved left from where they were when they started as Justices, but Justice Kennedy's move corresponded to the majority of the important opinions he wrote, assigned by the Senior Associate Justice. Justice O'Connor, on the other hand, wrote more opinions assigned by Justice Rehnquist. Hence, only Justice Kennedy's drift confirmed the self-persuasion hypothesis.

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[118] Janet L. Blasecki, *Justice Lewis F. Powell: Swing* Voter *or Staunch Conservative?*, 52 J. POL. 530, 532-34 (1990).

[119] Maltzman & Wahlbeck, *supra* note 13, at 126.

[120] David Cole, *The Liberal Legacy of* Bush v. Gore, 94 GEO. L.J. 1427, 1442-43 (2006) (mentioning the cases following *Bush v. Gore* in which either Justice O'Connor or Justice Kennedy voted with the liberal bloc).

[121] Epstein et al., *supra* note 7, at 1506.

6. Justice Souter

Justice Souter should have been a safe bet when he was nominated by Republican President George H. W. Bush. However, he disappointed conservatives more often than he delighted them. In discrimination cases, Justice Souter was almost as tenaciously pro-plaintiff as the Court's most liberal member, Justice John Paul Stevens.[122] Considered a reliable member of the liberal bloc, he moved left consistently, with several brief pauses during the mid-1990s and toward the end of his career on the Court.[123] Justice Souter was assigned more important opinions by the Senior Associate Justice than by Justice Rehnquist, and increasingly, he voted in a way that was consistent with the ideology he most often espoused in his opinions.

IV. EXPLAINING THE RESULTS: ALTERNATIVES AND MITIGATING FACTORS

There are several reasons why it may be difficult to see effects of self-persuasion. Of the thirteen Justices who served for any period of time between 1986 and 1993, all but two moved left. This pattern implicates the Greenhouse Effect.[124] Named for Linda Greenhouse, the Supreme Court Reporter for the New York Times, the Greenhouse Effect refers to the tendency for Supreme Court Justices to trend left, expressing more liberal views with a longer tenure on the Court.[125] This phenomenon has been attributed by some to the left-leaning media.[126] The media hypothesis is controversial, however. Some have argued that the force moving Justices to the left is socializing with the liberal Washington D.C. elite, a theory that puts the Justices' personal life in the spotlight, rather than blaming the media.[127] There is

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[122] LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM, tbl.6-5 (4th ed. 2007).

[123] Epstein et al., *supra* note 7, at 1506-09.

[124] Linda Wertheimer, *Supreme Court Reporter Linda Greenhouse Retires*, NPR, July 12, 2008, *available at* http://www.npr.org/templates/story/story.php?storyId=92489115.

[125] *Id.*

[126] In 1992, retired Judge Laurence Silberman of the D.C. Circuit coined the phrase "Greenhouse Effect." *See* Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar,* 95 CAL. L. REV. 1619, 1638 n.85 (2007).

[127] *See, e.g.*, Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1574 (2010).

some debate as to whether the Greenhouse Effect is a real phenomenon at all.[128] If the Greenhouse Effect is real, it could obscure or exacerbate the self-persuasion effect, depending upon whether the predicted drift was to the right or to the left.

Justices are charged with interpreting the Constitution, rather than blindly voting for whatever outcome favors a particular ideological perspective. Accordingly, Justices can be expected to sometimes vote contrary to ideology. What happens when they are assigned an opinion to write that advocates for a position contradictory to their typical position? Empirical psychological research has found that advocating for an opposing view makes one more favorable to that view. For Justices who take particularly serious their mandate to remain neutral, they may experience less ideological drift. Depending upon how often a Justice is assigned an opinion that advocates a less ideologically consistent position, that Justice, in arguing in favor of that opinion would be expected to drift to the center, ultimately becoming more centrist. This trend may occur with particular force to Justices who are the "swing vote". Swing voters are thought to receive more assignments, and more important assignments than Justices who trend more consistently in either direction. Writing for each side may counteract the polarizing effects of self-persuasion.

There are a number of reasons why self-persuasion might be adequately moderated so as to pose minimal danger at the level of the Supreme Court. As an initial matter, it is not at all clear that self-persuasion resulting in ideological drift predictably results in extremism on the bench. For conservatives writing largely conservative opinions, the Greenhouse Effect may result in an ideological pull in the opposite direction. Other influences, such as changes in the ideological makeup of the Court or reactions to endogenous or exogenous factors can influence Justices to vote to the left or to the right.[129] Importantly, the Chief Justice can serve

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[128] Wahlbeck, *supra* note 85, at 1729, 1754 n.85 (using the Martin-Quinn scores to show that the Court's median "grows significantly more conservative from the 1986 Term to the 1993 Term").

[129] Consider, for example, David Cole's argument that the Court moved left following its controversial decision in *Bush v. Gore*:

as a gatekeeper. Even in situations in which the Chief Justice might prefer to assign opinions to conservative or liberal allies, for strategic reasons, he or she is unlikely to benefit from assigning important opinions to ideologically extreme Justices.

Finally, Justices who disagree with the majority often draft dissenting opinions. Drafting dissents also has the potential to create a self-persuasion effect. Because this study only examined majority opinions, it does not reflect the number and ideological direction of *all* (majority, dissenting, and concurring) opinions that each Justice drafted. Were that information available, it might (contrary to the current analysis) confirm the self-persuasion hypothesis. In fact, there is some reason to think that the concurrences and dissents that are not included here would encourage more self-persuasion than majority opinions. The purely voluntary nature of authoring a dissent or concurrence would lead to a strong self-persuasion effect for several reasons. Justices write separately in the case of issues about which they feel especially strongly. Research has shown that attitude strength is associated with attitudinal persistence over time, resistance to attack, prediction of behavior, and influence on information processing.[130] Moreover, Justices will tend to dissent in the case of pet issues, for which they have previously made their opinions known. Research has shown that when an individual publicly states an attitude, that individual becomes more committed to that position.[131] It is interesting to note that

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> [T]he Court's most precious commodity is its own legitimacy. *Bush v. Gore* called that legitimacy deeply into question. The Court's record since then suggests that the Justices may realize this and, consciously or subconsciously, have sought to rehabilitate the Court's image by reducing partisan division, correcting to some extent the Court's considerably conservative tilt, and emphasizing the importance of a rule of law that is distinct from and rises above politics.

Cole, *supra* note 120, at 1431.

[130] *See generally* Shelly Chaiken et al., *Structural Consistency and Attitude Strength, in* ATTITUDE STRENGTH: ANTECEDENTS AND CONSEQUENCES 387 (R.E. Petty and J.A. Krosnick eds., 1995); Alice H. Eagly & Shelly Chaiken, *Attitude Strength, Attitude Structure and Resistance to Change*, *in* ATTITUDE STRENGTH: ANTECEDENTS AND CONSEQUENCES 413 (R.E. Petty and J.A. Krosnick eds., 1995); ALICE H. EAGLY & SHELLY CHAIKEN, THE PSYCHOLOGY OF ATTITUDES (1993).

[131] John R. Hollenbeck et al., *An Empirical Examination of the Antecedents of Commitment to Difficult Goals*, 74 J. APPLIED PSYCHOL. 18, 18-23 (1989).

some research has suggested that Supreme Court Justices write separately when they vote against ideology in order to reduce the dissonance they experience.[132] The research taken as a whole suggests that Justices have mixed motives for writing separately, and that these mixed motives make teasing out self-persuasion effects tricky, if not impossible.

CONCLUSION

Nowhere is the influence of ideology perceived to be more problematic than among Supreme Court Justices. The hierarchical structure of our courts imbues the Supreme Court with ultimate authority; the Court wields enormous power.[133] Moreover, the job of applying the Constitution to contemporary issues is thorny; the simplicity and brevity of the document leaves much to interpretation. To the extent that modern understandings of basic governance concepts are continuously morphing, the Constitution is a living document.[134] Even originalist interpretations of the Constitution are subject to personal bias. As legal realist Justice Holmes, once wrote, "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[135]

Psychological research and theory supports the notion that Supreme Court Justices may be influenced by the process of advocating particular arguments as they draft majority opinions. Although the social science suggests that Justices should move ideologically in the direction of the opinions they write, an analysis of authorship of majority opinions and ideological drift does not reveal self-persuasion effects. However, there are a host

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[132] Paul M. Collins Jr., *Cognitive Dissonance on the U.S. Supreme Court*, 64 POL. RES. Q. 362, 362-76 (2011).

[133] Ultimately, the power of the courts is derived from the federal Constitution. William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 825 (2009). Because of the enormous power wielded by the highest court, "ideology matters more in the Supreme Court than in the court of appeals." *Id.*

[134] "It is often said that the federal Constitution is a living document. But we hardly appreciate, I think, the degree to which this is true . . . ." PAGE SMITH, THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE HISTORY 11 (1978). Even originalist interpretations of the Constitution are subject to personal bias; there are certain contemporary influences we cannot escape.

[135] Missouri v. Holland, 252 U.S. 416, 433 (1920).

of additional factors and constraints that may obscure the influence of self-persuasion. Although there are a number of safeguards, and reason to be cautiously optimistic, the effects of self-persuasion on judicial ideology is a topic that merits greater attention and empirical study.